IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. PD-0517-16

EX PARTE JEROMY JOHN LEAX

PETITIONER / APPELLANT JEROMY JOHN LEAX'S POSTSUBMISSION BRIEF

ON PETITION FOR DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS; CAUSE NUMBERS 09-14-00452-CR AND 09-14-00453-CR, AFFIRMING CAUSE NUMBER 13-11-11867 CR (COUNTS I AND II) FROM THE 221ST DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS.

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15 FEBRUARY 2017

PD-0517-16

IN THE COURT OF CRIMINAL APPEALS

Leax v. State

Motion to File Additional Brief

and

Petitioner's Postsubmission Brief

TO THE COURT OF CRIMINAL APPEALS:

Mr. Leax moves under Texas Rule of Appellate Procedure 70.4 for permission to file this postsubmission brief.

SENATOR HUFFMAN'S STATEMENT OF INTENT

Senator Huffman's *Author's Statement of Intent* for Senate Bill 344 from the 84th Regular Legislative Session, filed March 21, 2015, may be found at:

http://www.legis.state.tx.us/tlodocs/84R/analysis/html/SB00344I.htm.

STANDING

Mr. Leax had standing when he filed his motion to quash, when the trial court erred by denying relief, when he filed his notice of appeal, and even when the parties filed their briefs in the Ninth Court of Appeals. While the State has now abandoned it, its primary argument below, on which the court below affirmed the decision of the trial court, was that section 33.021 restricted "conduct" rather than

content. *Opinion Below* at *2, *citing Ex parte Victorick*, No. 09-13-00551-CR, 2014 WL 2142129 at *2–7 (Tex. App. — Beaumont 2014, pet. ref'd) (holding that section 33.021 "punishes conduct rather than the content of speech alone").

Before September 1, 2015, the issues in this case were fixed. But according to the State's argument, Mr. Leax somehow lost his right to review of the trial court's judgment on September 1, 2015 when the amended section 33.021 of the Texas Penal Code took effect. To sum up: Before September 1, 2015, Mr. Leax has standing to challenge the statute. He does so on September 22, 2014. The State argues that the statute restricts conduct rather than content so strict scrutiny does not apply. The trial court buys this argument, also on September 22, 2014. Mr. Leax has standing to appeal the issue. He does so. The Court of Appeals buys the same argument on April 13, 2016. Mr. Leax petitions this Court for discretionary review, and in oral argument the State concedes that the argument on which Mr. Leax had lost all along was incorrect, but argues that because the State was able, with this specious argument, to keep a court from holding the statute unconstitutional from September 22, 2014 to September 1, 2015, Mr. Leax is now out of court. This cannot be the law.

The State couches its argument as one of "standing," but both of the cases it cites — *Bigelow* and *Oakes* — cast it as a "mootness" argument. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Massachusetts v. Oakes*, 491 U.S. 576, 585 (1989).

The State must call the issue "standing" rather than "mootness" because the issue between the State and Mr. Leax is still live — the trial court and court of appeals still erred, and he is still sitting in prison for violating a void statute — and not moot. In Texas mootness "can implicate jurisdiction, but only to the extent of the Texas Constitution's implied prohibition against advisory judicial opinions,"[1] *Kniatt v. State*, 206 S.W.3d 657, (Keller, P.J., concurring, *citing Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442–443 (Tex. 1998)), and that sort of mootness does not exist in this case. *Standing*, by contrast, is a component of subject-matter jurisdiction. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000).

[1] If this implied prohibition limits this Court to ruling on the language of the statute as invoked by the indictment, it might take a look at the petitions for discretionary review in *Ex Parte Chapman*, No. PD-0326-16, and *Ex Parte Mahmoud*, No. PD-0442-16, in which (unlike the current case) the State is not required by the pleadings to prove that the defendants "believed" the complainants to be children, but only that the complainants "represented" themselves to be children.

But calling the issue "standing" rather than "mootness" ultimately puts the State on no firmer footing: While parties may lose standing because an issue becomes moot, *Murphy v. Hunt,* 455 U.S. 478, 481 (1982), counsel has sought but has not found any precedent supporting the proposition that a defendant may lose standing, once it is obtained, for any reason other than mootness. The ultimate issue before this Court is whether the trial court erred, an error that is final at the time the appeal begins, and nothing that happened after the trial court's error makes that error less erroneous.

Whatever it is called, the argument is answered by five justices in Justice Scalia's *Oakes* concurrence. *Minnesota v. Oakes*, 491 U.S. at 587 (1989) (Scalia, J., concurring). In order to find that Mr. Leax now lacks the standing that he had for at least the first eleven of this litigation months, this Court would have to adopt Justice O'Connor's minority view in *Oakes*, that an overbroad statute is "voidable." This "bizarre" (Justice Scalia's word) notion is contrary to this Court's holding that a facially unconstitutional statute is void *ab initio*. *Smith v. State*, 463 S.W.3d 890, 896 (Tex. Crim. App. 2015).

Mr. Leax indisputably had standing at the time the trial court erred by denying his motion to quash. Because the trial court erred,

the court of appeals erred by affirming it. Subsequent events do not change that. The dispute between Mr. Leax and the State still exists — he sits in prison — so mootness in the sense in which Texas Courts usually use it is not an issue. Barring mootness, standing is determined as of the time of the error.

Article 1, section 13 of the Texas Constitution provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Mr. Leax was injured in his person and reputation by his prosecution under a statute that was void *ab initio*, and by the erroneous denial of his motion to quash. For the Legislature to be able to deprive him now of standing (thereby depriving this Court of jurisdiction) *ex post facto* after standing had attached and litigation had begun would violate both this Open Courts provision and the Separation of Powers clause, Tex. Const. art. 2, § 1.

It would also stymie judicial review to allow the Texas Legislature to dodge overbreadth review by amending a statute in the face of an overbreadth challenge.

The Interplay Between "Real and Substantial Overbreadth" and Strict Scrutiny

If a content-based restriction forbids only unprotected speech, it is not unconstitutional. This is a shortcut to strict scrutiny: the recognized categories of historically unprotected speech reflect a judgment that the government has a compelling interest in restricting speech in these categories; a statute that forbids only speech in these categories is by definition narrowly written to satisfy that interest.

Similarly, if the content-based restriction forbids some protected speech, but not a *real and substantial* amount of protected speech, it might be said, practically, to be the least restrictive means of satisfying the government's compelling interest in restricting the unprotected speech.

How much protected speech is "substantial"? The answer is not clear. How many cyanide-laced M&Ms in the bowl are a "substantial" number? The poisonous M&Ms don't have to be in the majority to be "substantial," but is one substantial in relation to ten? To one hundred? To one thousand? If you know that one M&M in a million will kill you, do you eat M&Ms? If not, is that not a substantial number?

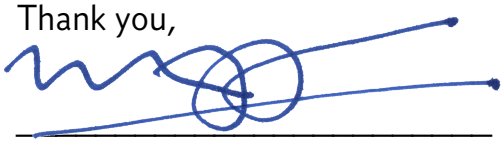
Theoretically, at least, at some point the number of people who would engage in constitutionally protected but forbidden speech becomes insubstantial compared to the number engaged in constitutionally unprotected forbidden speech. But where, as here, the legislature writes provisions into a statute *solely to capture* the protected speech, surely that speech is substantial in relation to the unprotected speech.

Grave and Imminent Threat

The Supreme Court in *Alvarez* cites *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), for the proposition that "speech presenting some grave and imminent threat the government has the power to prevent" is unprotected. *U.S. v. Alvarez*, 132 S.Ct. 2537, 2544 (2012). It cites *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) (the "Pentagon Papers" case) for the proposition that "a restriction under [this] category is most difficult to sustain. *Id.* In neither *Near* nor *New York Times* did the Court find the speech unprotected. Whatever "speech presenting some grave and imminent threat the government has the power to prevent" means (*New York Times* suggests that it applies only during wartime, 403 U.S. at 726) it does not include solicitation of a crime, much less the intentless fantasy almost-solicitation of a person

who is not, whom the defendant does not believe to be, but who represents himself to be, a child.

Thank you,



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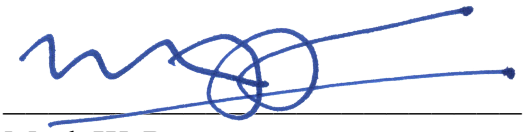
Certificate of Service and Compliance

A copy of this petition was served upon the State of Texas by electronic filing and on February 16, 2017 by email to attorneys for the State Stacey Soule, P.O. Box 13046, Austin, Texas 78711-3046, at stacey.soule@spa.texas.gov and Jason Larman, 207 W. Phillips, Second Floor, Conroe, Texas 77301, at jason.larman@mctx.org.

This petition uses Matthew Butterick's Equity and Concourse typefaces in 14-point. Margins are 1.5 inches, on principles suggested by Butterick's *Typography for Lawyers*.

According to Microsoft Word's word count, this petition comprises 1,411 words, not including the: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.



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